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What is the Beginning of an Action or Suit in West Virginia?

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WHAT IS THE BEGINNING OF AN ACTION OR SUIT IN WEST VIRGINIA?—The question at what time a legal proceeding has been instituted is frequently of great procedural importance. To call attention to some of the more important occasions when the question may arise, it may be mentioned that the instituion of an action stops the running of the statute of limitations; that it marks the earliest stage of the proceeding at which the doctrine of *lis pendens* affecting the rights of third parties, applies; and that, under the local law, it is a condition precedent to suing out an attachment. Moreover, it is fundamental law that an action can not be properly instituted until the cause of action has accrued. Hence the question whether an action shall abate as having been prematurely brought will involve an inquiry as to the time when the action was begun.

Under the common-law practice in England, the procedural step which constituted the beginning of a common-law action depended upon the variant methods of procedure which prevailed in the different courts. If an original writ was issued, as in the common pleas, the issuing of the writ was the beginning of the action; but if no original writ issued, as in the king's bench, the filing of the declaration (there called the bill) was the beginning of the action.[1] Under the regular English chancery practice, the first step in the procedure was the filing of the bill[2] The filing of the bill, with a prayer for process, was a condition precedent to the issuing of the subpoena. Hence the filing of the bill is usually spoken of as the beginning of a suit in chancery.[3]

A West Virginia statute provides that "the process to commence a suit, shall be a writ commanding the officer to whom it is directed, to summon the defendant to answer the bill or action."[4] This statute has been construed to mean that all common-law actions in which process issues and all suits in chancery shall be considered as instituted and pending upon the issuance of process.[5] Since under the American procedure there is no writ corresponding to the English original writ, the process mentioned by the West

[1] Foster *v.* Bonner, 2 Cowp. 454, 98 Eng. Rep. Reprint 1183 (1776).
[2] STORY, EQUITY PLEADING (10 ed.) 6, citing Clark *v.* Slayton, 63 N. H. 402 (1885); FLETCHER, EQUITY PLEADING AND PRACTICE, § 64; SHIPMAN, EQUITY PLEADING, 63.
[3] See authorities cited in the preceding note. But see Stone *v.* Tyree, 30 W. Va. 687, 5 S. E. 878 (1888), relying upon Newman *v.* Chapman, 2 Rand. 93 (Va. 1823), to the effect that no *lis pendens* exists "till the service of the subpoena, and bill filed," and that, if the bill is filed after the service of the subpoena, "the *lis pendens* relates back to the service of the subpoena, and not to the day on which the subpoena was issued." Also see 17 R. C. L. 1033, § 30. The later West Virginia cases are *contra* to Stone *v.* Tyree. See Geiser Manufacturing Co. *v.* Chewning, 52 W. Va. 523, 44 S. E. 193 (1903); Columbia Finance & Trust Co. *v.* Fierbaugh, 59 W. Va. 334, 53 S. E. 468 (1906).
[4] W. Va. Code, c. 124, § 5.
[5] United States Blowpipe Co. *v.* Spencer, 46 W. Va. 590, 33 S. E. 342 (1899); Oil and Gas Well Supply Co. *v.* Gartlan, 58 W. Va. 267, 52 S. E. 524 (1905).

Virginia statute corresponds to the English judicial writs, which followed after and supplemented the English original writ. In the action of ejectment, no writ issues, and the statute provides that "the action shall be commenced by the service of a declaration * * *,"[6] with a notice "subjoined" notifying the defendant when the declaration will be filed.[7] Before a justice, "the action is commenced upon the delivery of the summons to be served;" or if the action is started by appearance and agreement of the parties, "at the time of docketing the case."[8]

In a proceeding under chapter 121 of the West Virginia Code to obtain judgment by motion, no process issues out of the clerk's office. In lieu of a writ, a notice issued by the plaintiff and authenticated by him is served on the defendant. Since the statute previously mentioned as applying to common-law actions and suits in chancery obviously can have no application in the proceeding by motion, and since the statute authorizing the latter proceeding has no express provision specifying the time when the proceeding shall be considered an action pending, it is necessary to settle the question by referring to general questions of procedure. A recent West Virginia case,[9] following the lead of the Virginia court which had already decided that the action does not begin with service of the notice on the defendant,[10] has decided that an action is first pending when the notice has been served, returned and filed with the clerk, and not, as argued by counsel, when the motion is made. Consequently, it was held that there could be no valid judgment for recovery on a note not due at the time when the notice was filed in the clerk's office.

It is believed that the court reached a proper conclusion in this case. It will be noted that it is the general policy of the local law to adopt the *first official act* in the procedure as the beginning of the action. In ordinary actions, this act is the issuing of process. In the proceeding by motion, however, there is no official act until the filing of the notice. As is noted by the Virginia court,[11] until the notice is filed with the clerk it is a mere private paper, and the fact that it has been served upon the defendant should not change its status in this respect. But after the notice is once filed, there is every reason why the proceeding should have the same status as a common-law action in which process has been issued. When a defendant has been summoned to answer a cause of action, he

[6] W. Va. Code, c. 90, § 6.
[7] *Idem*, c. 90, § 11.
[8] *Idem*, c. 50, § 20.
[9] Charlton *v.* Pancake, 127 S. E. 70 (W. Va. 1925).
[10] Furst *v.* Banks, 101 Va. 208, 43 S. E. 360 (1903).
[11] *Idem.*

is entitled, for various reasons, to know, as soon as convenient, that the proceeding has assumed a legal status. This consideration has more force in view of the fact that generally much less time intervenes between the filing of the notice and trial of the case than between the issuing of process and trial of the action. Perhaps even more substantial reasons may be urged why the interests of the plaintiff will be subserved by the rule that an action is pending with the first official act in the proceeding. If, instead of having brought his action prematurely, as in the principal case, he should desire to stop the running of the statute of limitations, or to sue out an attachment, his attitude toward the question likely would be different.

In actions which are started by a writ, the date of the writ is *prima facie* the date of its issuance;[12] but as to what constitutes issuance, the authorities are in conflict.

> "On the one hand it is claimed that when the plaintiff has made his memorandum and the clerk has filled out the writ for the purpose of delivery, this is all that can be required of him. On the other hand, it is insisted that to 'issue' is to put forth, to send out, to deliver by authority, and hence that the writ or summons must not only be filled out, but delivered, or at least put in the course of delivery to some one who may legally serve it. The latter view would, on principle, seem to be preferable."[13]

The view expressed above by Judge Burks has been carried into the Virginia Code by the revision of 1919, in the following language:

> "It shall not be deemed to have been issued until delivered or placed in course of delivery to some officer or other person to be executed."[14]

There is no such statute in West Virginia, and, so far as the writer has been able to determine, the question has never been settled by adjudication in this state. Apparently, in the numerous cases where the question has arisen as to when the action or suit was pending, the date of the process has been accepted as a true criterion as to the time when the action or suit began without any attempt to impeach it, and hence without any necessity for defining what is "issuance" of purpose.[15] —L. C.

[12] Lambert *v.* Ensign Manufacturing Co., 42 W. Va. 813, 26 S. E. 431 (1896); KITTLE, MODERN LAW ASSUMPSIT, 112, and cases cited; BURKS, PLEADING AND PRACTICE, 401.

[13] BURKS, PLEADING AND PRACTICE, 400. See authorities cited.

[14] Va. Code 1919, § 6061.

[15] In Lawrence *v.* Winifrede Coal Co., 48 W. Va. 139, 35 S. E. 925 (1900), at page 143, Judge Brannon, by way of *dictum*, referring to the fact that the date of the process is *prima facie* the date of its issuance, says, "this construction relieves all uncertainty as to when the process goes into the hands of the officer." Judge Burks apparently cites this case to uphold the proposition that delivery to the

officer for service is prerequisite to issuance, and the statement may be based on the supposition that the date of the process is *prima facie* the date when it is delivered to the officer for service, rather than the date when it is filled out and signed, and that the time of delivery is thus made certain. However, it is believed that the language may be subject to a different interpretation. Judge Brannon concedes that the date of the process is only *prima facie* evidence of the date of its issuance. Hence the date of the process could relieve from uncertainty as to the time of delivery only when the date is undisputed, and therefore could not relieve from "all uncertainty." The language is loosely constructed, and may have been intended to convey somewhat such meaning as follows: "This construction relieves [from] all uncertainty [such as would prevail if it were necessary to inquire] as to when the process goes into the hands of the officer." Judge Brannon may have realized that the time of issuance must be uncrtain if it is to be fixed by the time when the process is delivered to the officer for service, and may refer to the fact that the date of the summons is more likely to coincide with the time when it is filled out and signed than with the time when it is, perhaps more or less casually, delivered to the officer to be served.